

**Bosart Co. and United Food and Commercial
Workers Union, Local No. 1099, AFL-CIO.
Case 9-RC-15926**

July 8, 1994

**DECISION AND DIRECTION OF SECOND
ELECTION**

BY CHAIRMAN GOULD AND MEMBERS BROWNING
AND COHEN

The National Labor Relations Board, by a three-member panel, has considered objections to an election held September 18, 1991, and the hearing officer's report recommending disposition of them.¹ The election was conducted pursuant to a Stipulated Election Agreement. The revised tally of ballots shows 72 for and 75 against the Petitioner, with 3 challenged ballots and 1 sustained challenge, an insufficient number to affect the results.

The Board has reviewed the record in light of the exceptions and briefs, has adopted the hearing officer's findings² and recommendations,³ and finds that the election must be set aside and a new election held.⁴

[Direction of Second Election omitted from publication.]

¹ The pertinent part of the hearing officer's report is attached as an appendix to this decision.

² The Employer has excepted to some of the hearing officer's credibility findings. The Board's established policy is not to overrule a hearing officer's credibility resolutions unless a clear preponderance of all relevant evidence convinces us that they are incorrect. *Stretch-Tex Co.*, 118 NLRB 1359, 1361 (1957). We have carefully examined the record and find no basis for reversing the findings.

³ In the absence of exceptions, we adopt pro forma the hearing officer's recommendation to overrule the Petitioner's Objection 1 and to approve the withdrawal of its Objections 2 and 4.

⁴ In our view, the problem in the instant case raised by the Petitioner's Objection 7 can be avoided in the future if the Board agent conducting the election informs the parties that the use of a supervisor as an observer may result in setting aside the election.

Member Cohen finds that the Union did not knowingly acquiesce to the Employer's use of a supervisor as an observer. Accordingly, he does not pass on the issue of whether an election should be set aside if a union knowingly acquiesces to the employer's use of a supervisor as an observer.

APPENDIX

HEARING OFFICER'S REPORT

Objection 7

In this objection, the Petitioner contends that the Employer's observers were supervisory or closely identified with the Employer's management.⁵ In support of this objection, the Petitioner presented employees Linda Ray, Kathleen Reynolds, Sharon Daniels, Joyce Martin, and petitioner rep-

⁵ Although this objection specifically refers to more than one observer, the record evidence indicates that the objection refers to the status of one of the observers, Helen Bostick.

resentatives, Paula Hall and James Dudley. Inasmuch as the testimony of the employees, generally, regard similar incidents, I shall summarize it, except in relevant or pertinent part. The employees testified that in or around their dates of hire,⁶ they placed employment applications with the Employer and were eventually telephoned by Helen Bostick, the Employer's human resource coordinator, for an interview, or in the instance of Reynolds, was interviewed immediately after submitting the application. Daniels indicates that her employment interview resulted from calls initiated by her. According to these witnesses, the interviews each lasted approximately 30 to 45 minutes and resulted in employment offers being made by Bostick at the conclusion of three of the interviews. Concerning Daniels, at the conclusion of the interview, Bostick told her that her references would have to be checked and that she would call her later. A few hours later Bostick called and offered her employment. Two employees, Reynolds and Ray, testified that employment offers were made by Bostick without her having contact with any other individual before making the offer. Reynolds testified that she, without contradiction, was introduced to a foreman, but after the offer of employment had been made by Bostick. Martin testified that Bostick introduced her to the foremen of various departments before an employment offer was made by Bostick and that Martin's contact with the foremen was limited to an introduction.⁷ Reynolds also testified that foreman, Cheryl Coey, had told her that Bostick was one of the individuals who reviewed employee evaluations in determining whether employees are granted a wage increase.

The Petitioner's representatives, Hall and Dudley, essentially, testified that the Petitioner did not raise objection to Bostick serving as an observer during the preelection conference or between the two election sessions. However, both Hall and Dudley testified, without contradiction, that the Petitioner did not become aware of Bostick's status until after the election had concluded.

The Employer takes the position that Bostick is not a supervisor as defined in the National Labor Relations Act (the Act), and that in the alternative, in the event that she is found to be a supervisor, the Petitioner's objection to her serving as an observer is untimely. The Employer did not take a position concerning Bostick's alleged alliance with management. To support its position, the Employer presented Bostick, Human Resource Manager Boulton, Warehouse Operations Manager Douglas James, and Training Development Manager Steve Bundy. Bostick testified that she was the human resource coordinator and had held that position for the past 6 years. She reports to Boulton and has one subordinate, her secretary,⁸ Becky Burke. Regarding Bostick's role in the hiring process, Bostick testified that as a need arises for a position to be filled, she is informed of this by the department manager of the department in which the need has occurred. Bostick initially testified that Burke, who has previously filed the employment applications, screens those applications and schedules interviews. Bostick later conceded that Burke performed this function according to Bostick's in-

⁶ The Petitioner's witnesses were all hired during 1989 and 1990.

⁷ There is no indication in the record about whether Bostick spent any amount of time speaking to the foremen as she took Martin to the departments.

⁸ Although Bostick initially referred to this position as processor, she later referred to it as assistant and secretary.

structions. Bostick related that she generally spends approximately one-half hour with each applicant and then takes the applicant to the department manager, who "on occasion" conducts a second interview. However, moments later, Bostick testified that during the 4 or 5 months prior to the hearing, second interviews were "always" conducted by the department manager, particularly for the warehouse. Bostick claimed that she has no authority to offer employment to job applicants and that she had never made the decision regarding the hire of any applicant. Later during the hearing, Bostick admitted that during 1989 there were some "on the spot" hirings of some applicants but that she had no authorization to have done so. She averred that concerning the warehouse employees, the warehouse manager has always made the determination to hire any particular individual. Bostick stated that during the 1991 calendar year (to the date of the hearing), among 1700 applicants, her assistant, Burke, has screened out approximately 1440 applicants⁹ and that among the remainder who were interviewed approximately 136 were hired. Bostick also testified that only an approximate 20 applicants had been rejected by department managers during 1991. Concerning the hire of Reynolds, Bostick maintained that "someone" whom she did not recall at the time of the hearing had told her of Reynold's good work performance as a temporary employee and that if she ever applied for employment she should be hired. Regarding Ray, Bostick related that when she presented the warehouse manager with Ray's good and strong work history, he gave Bostick prior authorization to hire her. Bostick did not recall the details involving Martin's hire, but contended that they were similar to those involving Ray and Reynolds, as testified to by Bostick. Bostick denied exercising any independent judgment in her role in the hiring process, but conceded that she determines what questions to ask the applicants during the interviewing process and that she made the determinations concerning which applicants best met the qualifications, needs, or requirements of the job. Boulton, in summation, testified that Bostick must consult with a department manager before advising an applicant of his/her hire and that the consultation between Bostick and the department manager occurred in the form of person-to-person communication or telephone communication. Warehouse Operations Manager Douglas James testified that Bostick screens the applicants and gives him recommendations by sending him the applications of the applicants. He stated that since June or July 1991, he had been interviewing all the applicants who have been referred to him. Training and Development Manager Steve Bundy testified that he took over the screening and interviewing of applicants when Bostick vacationed and that he, in essence, did the same things that she testified to doing.

Regarding Bostick's other duties and responsibilities, the record reflects that she assists employees in their understanding and claims of the benefits such as medical insurance, life insurance, disability insurance, and retirement benefits. She ensures that all merit reviews which are used for determining wage increases are conducted and that the recommended increases are in accordance with the compensation policies of the Employer's parent company. Bostick is

responsible for assisting in the Employer's understanding and compliance with the Immigration Reform and Control Act. She is responsible for ensuring that the Employer complies with its payroll procedures and for assisting the Employer in its preparation of a legal defense in cases before the Equal Employment Opportunity Commission (EEOC) and the wage and hour division of the United States Department of Labor (DOL). Bostick testified that since the hire of Boulton, in 1989, she no longer participates in any policymaking procedures or functions. The record also reflects that under the title "Harassment" in the employee handbook, employees are told to direct their complaints of harassment to the human resource coordinator, who will in turn, report the complaint to the president. The handbook states that a prompt investigation will be conducted thereafter. Although Bostick initially testified that she did not recall that she had ever received a complaint about sexual harassment, she later admitted that an incident had been reported to her by a temporary employment agency, investigated by her and resulted in the discharge of an employee. Bostick's office is accessed from the same hallway as the office of the Employer's president, human resource manager, and safety and security manager. Those offices are separated from the warehouse operations by a locked security door. Bostick is a salaried employee, as opposed to the warehouse employees who are hourly, and she wears an orange identification badge which is the same color as those worn by salaried employees (foremen and up). By contrast, the bargaining unit employees wear white badges, the commissary employees wear blue badges, and the driver employees were yellow badges.¹⁰ Bostick admits that she attends management meetings. And she admitted that concerning her assistant, she has the authority to assign work, grant time off, evaluate, and discipline her. Bostick contended that she does not have authority to exercise supervisory indicia regarding the warehouse employees.

The merits of this objection obviously turn on the necessity to resolve the issue regarding Bostick's supervisory status and/or alliance with the Employer's management. Regarding the latter, although testimony regarding Bostick's role in the Employer's interviewing and hiring process of applicants for bargaining unit positions was guarded or what may be more appropriately described as shrouded, the record evidence supports the conclusion that she has a significant role in the hire of the bargaining unit employees. In this regard, I note that by Bostick's own admission, she initially determines which applicants will be considered beyond the application stage of the hiring process.¹¹ Further, the record evidence, including the admissions by Bostick and James, supports the conclusion that it is Bostick who makes recommendations for hire, or the very least consideration for

⁹It should be remembered that Bostick had initially testified that Burke screened the applications prior to the interviews, but later conceded that this was done according to Bostick's instructions.

¹⁰Bostick claimed not to recall the color of the badge worn by her secretary among the four colors assigned to the identification badges of the Employer's employees, but she miraculously recalled that it was not the same color as her badge. The record also reveals that not only do badge colors differentiate between salary and hourly employees, but also another criteria that the Employer's witnesses who testified in this regard claim not to recall.

¹¹Although it has been suggested that this determination is routine in nature and based on whether the applicant can meet the shift schedule, the record evidence demonstrates that Bostick's emphasis of an applicant's work record led to the hire of the applicant.

hire, among the applicants who survive the initial screening process. Concerning the effectiveness of these recommendations, a conclusion may also (see the previous footnote) be made in the example of the number of individuals rejected for hire during 1991 by the Employer's department managers, whom the Employer contends have the authority to make decisions regarding the hire of applicants. At the time of the hearing, an approximately 86 percent were hired from among the applications/recommendations sent to the warehouse operations manager by Bostick,¹² notwithstanding that second interviews may have been conducted as the Employer would have it believed. In any event, the record evidence establishes that Bostick effectively recommends the hire of the bargaining unit employees, a responsibility that not only lends itself to supervisory indicia, but also comports with a conclusion that she is in a position of potential conflict with bargaining unit employees, which is a factor that often distinguishes managerial status from rank-and-file status.¹³ In consideration of Bostick's other duties, the record reflects that she ensures that merit reviews are conducted and comport with the Employer's compensation policies.¹⁴ Thus, it appears from the record evidence that Bostick effectuates the Employer's compensation policies regarding merit review recommendations as well as regarding the Employer's payroll activities. The record also established that Bostick is responsible for providing assistance to the Employer in preparation for legal defense in EEOC and Wage and Hour, DOL cases. This duty alone gives credence to the conclusion that Bostick's interests are in direct conflict with those of bargaining unit employees and are more aligned with those of the Employer's management. Additionally, Bostick has been held out to the employees by the Employer to be the receiver of employee complaints (grievances) regarding harassment and thus, a part of the mechanism through which such complaints may be redressed. Indeed, the record evidence supports that complaints of harassment (sexual in this case) may effectively be redressed, as exemplified by the discharge of an employee as a result of a sexual harassment complaint.¹⁵ Other record evidence, while alone is not dispositive but combined with the aforementioned evidence, lends itself to

¹² Bostick testified that among applicants who were interviewed, 136 were hired and that only approximately 20 were rejected by the department managers.

¹³ See generally discussion in *Bell Aerospace Co.*, 196 NLRB 827 (1972).

¹⁴ Although testimony was elicited from Bostick by the Employer to show that she had never complained to a supervisor that the recommended merit increases were too high or too low, I find that this testimony is not dispositive of the fact that she reviews the merit recommendations for the designed purpose of carrying out the Employer's policies in this regard. Moreover, that Bostick may never have confronted a supervisor regarding the amount of the recommended merit increase does not establish that she does not consult anyone or that her role in the review process is menial. If such were true, there would be no need for her review and initialing of the documents that recommend the merit increases.

¹⁵ It is of no moment that the complaint was made through or by a temporary employment agency. The fact remains that Bostick has been designated by the Employer as its agent to receive employee (temporary or otherwise) complaints.

the conclusion that Bostick is closely identified with the employer management is that she attends management meetings, has an office which is located in an area with other admitted managerial personnel, and wears identification paraphernalia that not only distinguishes her from rank-and-file employees, but also identifies her with the upper echelon of the Employer's organization.¹⁶ Moreover, the undisputed record evidence establishes, that Bostick exercises supervisory indicia regarding her secretary.

In view of the foregoing, I find that Bostick is, as the Petitioner contends, a supervisor and an employee who is closely identified with the Employer's management.¹⁷

Turning to the issue of whether the Petitioner timely raised the objection, to Bostick serving as the Employer's observer, the record evidence is unrefuted that the Petitioner did not become aware of Bostick's status until after the election. And, there is no record evidence to indicate that prior to the election, the parties were aware of the individuals who were to serve as observers for the respective parties. Therefore, the first opportunity the Petitioner had to object to this issue was at the objection stage and it did so. The facts in this case stand in contrast to those set forth in the cases relied on by the Employer.¹⁸ The most prominent distinguishing factor is that the Petitioner was not aware of Bostick's status at any time prior to or during the election periods. Therefore, Bostick's presence during the election period must be considered in that light. As the Board has consistently held, the presence of a supervisor or one who is closely allied with management as an observer is inherently coercive as their presence at the polls may unduly influence employees.¹⁹ Accordingly, I recommend that this objection be sustained and that the election be set aside.

¹⁶ I am not persuaded by the veiled testimony and convenient lapse of memory of the Employer's witnesses who testified in this regard that the color on the badge worn by Bostick distinguishes her only as a salaried employee.

¹⁷ *Sears, Roebuck & Co.*, 193 NLRB 330 (1971); *B-P Custom Building Products*, 251 NLRB 1337 (1980); and *Mid-Continent Spring Co.*, 273 NLRB 884 (1985).

The cases relied on by the Employer to support its position that Bostick is not a supervisor are distinguishable from the instant matter. In *John N. Hansen Co.*, 293 NLRB 63 (1989), unlike the instant matter, the alleged supervisor had a miniscule role in the Employer's interviewing and hiring process regarding employees and there was no evidence that the employee exercised any supervisory indicia that was not of a routine nature. In *Maremont Corp.*, 251 NLRB 1617 (1980), there was no evidence that the alleged supervisor had exercised any supervisory indicia, as in the instant matter. In *California Beverage Co.*, 283 NLRB 328 (1987), the alleged supervisor was not involved in the screening or weeding out of applicants prior to the interviewing stage, as in this case, and did not exercise supervisory indicia. In *Bowne of Houston*, 280 NLRB 1222 (1986), contrary to the authority possessed by Bostick, the alleged supervisor exercised supervisory authority on an irregular or sporadic basis which is insufficient to establish supervisory status.

¹⁸ *Howard Cooper Corp.*, 121 NLRB 950 (1958); *Montgomery Ward & Co.*, 228 NLRB 750 (1977); and *Northern Telecom Meridian Systems*, 297 NLRB 256 (1989).

¹⁹ *Worth Food Markets*, 103 NLRB 259 (1953); *Westinghouse Electric Corp.*, 118 NLRB 1625 (1958); and *Mid-Continent Spring Co.*, supra.